THE LIMITS TO ESTOPPEL: FLEXIBILITY AND UNCONSCIONABILITY

This paper advises caution in giving the doctrine of estoppel too broad a scope. The flexibility and wide utility of estoppel, referred to by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*,[1] make it essential to define the limitations to the doctrine. This need for caution will be highlighted by considering the role of unconscionability in estoppel claims and by defining the circumstances in which estoppel is the appropriate response to unconscionable conduct. As a preliminary point, it should be noted that unconscionability is being discussed here in connection with the *creation* of rights. This is conceptually different to the other use of unconscionability as a factor vitiating an existing contractual agreement.[2] The role of unconscionability will be discussed primarily by reference to English claims to the species of estoppel traditionally referred to as proprietary estoppel. The paper is divided into three parts. The first part provides a historical overview of the development of proprietary estoppel. Second, the role of unconscionability is discussed. Thirdly, the paper considers the correct division between estoppel and restitution, which provides an alternative response to one type of unconscionable conduct. Before considering these, it is necessary to explain the substantive context in which the research for this paper has been conducted.

Proprietary estoppel is one of a number of rules by which rights in land can be acquired without compliance with the usual formality requirements which are imposed in relation to land transactions. It has recently been described by the English Law Commission as "one of

[1][1995] 3 MLJ 331, at page 344.

[2]Nicholas Bamforth, "Unconscionability as a Vitiating Factor" [1995] L.M.C.L.Q. 538, at page 542.

the principal vehicles for accommodating the informal creation of proprietary rights".[3] The other principal rules enabling informal acquisition have been developed to deal with a particular factual situation, or enable the acquisition of a particular type of right. For example, rules have developed specifically to apply in the context of informal gifts of land, while the application of the doctrine of resulting and constructive trusts enable the acquisition of a beneficial interest without a formally declared trust. The importance of estoppel is that it has a much broader application. It applies in any factual situation in which the elements of a claim are satisfied (for example, whether an informal gift or an informal transfer on sale). Moreover, as the remedy awarded to the estoppel claimant (hereafter, C), is within the courts' discretion, estoppel has the potential to be used to circumvent the formality requirements for the grant of any legal or equitable right in land. Due to its breadth, estoppel potentially provides a *carte blanche* to circumvent formality requirements. It thus represents a considerable challenge to what may be described as the "policy of formality" that now governs dealings in land.[4] In light of this, there are two ways of limiting the scope of estoppel, and therefore of preserving the integrity of formality requirements. First, through limiting the circumstances in which estoppel may be claimed. It is in this respect that the role of unconscionability arises. Secondly, through the courts' remedial discretion. From C's point of view, the usefulness of estoppel in circumventing formality requirements is assured only if C is awarded his expectation. English courts currently recognise C's expectation as the maximum remedy available.[5]

The Development of Proprietary Estoppel

The historical development of proprietary estoppel is well-documented[6] and it is not necessary to give more than a brief overview. Such an

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[3]Law Com No. 254, "Land Registration for the Twenty-First Century", paragraph 3.33.

[4]Contrast the "policy of informality" Moriarty sought to identify in "Licences and Land Law: Legal Principles and Public Policies" (1984) 1000 L.Q.R. 376, at page 398.

[5]*Lloyds Bank plc v Carrick* [1996] 4 All ER 630, at page 641.

[6]See example, Kevin Gray, "Elements of Land Law", Second Edition (1993), Ch. 11.

overview is useful as it makes apparent the changing scope of the doctrine.

Historically, proprietary estoppel applied in three categories of cases. First, in the context of informal gifts of land. Secondly, in cases involving a "common expectation" where the representor encouraged C to believe he will acquire rights in the representor's land. Thirdly, in "unilateral mistake" cases, where the representor, who is aware of the true position, acquiesced in C's mistaken belief he had a right in the land. In *Willmontt v Barber*,[7] Fry J. explained the requirements of an estoppel claim in terms of five probanda, which apparently restricted estoppel to cases involving a unilateral mistake. This restriction was finally removed by Oliver J. in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co.*[8] In a judgment that provides the starting point for the modern doctrine of proprietary estoppel, he explained:

> "the application of [estoppel] ... requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour".[9]

Oliver J.'s approach has subsequently been approved by the Court of Appeal and Privy Council.[10] In the context of the broad approach, the key elements of a claim are traditionally perceived as being that there has been an assurance of rights, upon which C has relied to his

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[7](1880) 15 Ch. D 96.

[8][1982] 1 Q.B. 133.

[9]Above, note 8, at pages 151-152.

[10]*Habib Bank Ltd v Habib Bank A.G. Zurich* [1981] 1 W.L.R. 1265 (C.A.); *Lloyds Bank plc v Carrick*, above, note 5 (C.A.); *Lim Teng Huan v Ang Swee Chuan* [1992] 1 W.L.R. 113 (P.C.). Contrast the application of Fry J.'s probanda by Roch L.J. (with whom Hirst L.J. agreed) in *Matharu v Matharu* (1994) 68 P. & C.R. 93.

detriment. However, while the concept of unconscionability was central to Oliver J.'s judgment, its precise role in estoppel claims remained uncertain.

The Role of Unconscionability in Estoppel Claims

The modern doctrine of estoppel is considered to be founded on the desire to prevent unconscionable conduct.[11] In *Taylors Fashions*, applying his broad approach (outlined above), Oliver J. considered the question for the court was "whether, in all the circumstances of the case, it was unconscionable for the defendants to seek to deny that which, at the material time, everybody shared".[12] On a number of occasions, the courts have emphasised that there is no jurisdiction to intervene to prevent the representor asserting his legal rights unless it would be unconscionable for him to do so. In *Crabb v Arun D.C.*, for example, Scarman L.J. explained, "The court therefore cannot find an equity established unless it is prepared to go as far as to say that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff".[13] It is submitted that unconscionability has a more active role in estoppel than merely to provide an underlying policy goal.[14] There are at least four ways in which the role of unconscionability in estoppel may be defined. Each will now be examined and it will be submitted that only one is both consistent with the estoppel doctrine and imposes an appropriate limitation to the scope of estoppel claims.

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[11]See example, Margaret Halliwell, "Estoppel: Unconscionability as a Cause of Action" (1994) 14 L.S. 15; Mark Powlowski, "The Doctrine of Proprietary Estoppel" (1996), Ch. 10.

[12]Above, note 8, at page 155.

[13][1976] 1 Ch. 179, at page 195. See also, example, *Inwards v Baker* [1965] 2 Q.B. 29, at page 35; *E.R. Ives Investment Ltd v High* [1967] 2 Q.B. 379, at pages 394-395; *Taylor v Dickens* [1998] 1 F.L.R. 806.

[14]Contrast, Bamforth's second sense in which unconscionability is applied, above, note 2, at page 540.

(i) Unconscionability as the Sole Requirement for an Estoppel Claim

The broadest argument made is that unconscionability establishes an estoppel independently from the need to demonstrate an assurance and detrimental reliance. If accepted, this would give unconscionability a role in the creation of rights analogous to its role in vitiating contracts.[15] Although this approach has received academic support,[16] the prevailing judicial opinion in England is against it. In *Taylor v Dickens*,[17] Judge Weeks treated an argument based on this approach with "undisguised hostility".[18] He explained:

> "In my judgment there is no equitable jurisdiction to hold a person to a promise simply because the court thinks it unfair, unconscionable or morally objectionable for him to go back on it. If there were such a jurisdiction, one might as well forget the law of contract and issue every civil judge with a portable palm tree".[19]

Such a broad means of circumventing formality requirements for transactions in land is unlikely to be accepted, not least as the requirements for a contract for sale of land were made more stringent in the Law of Property (Miscellaneous Provision) Act 1989.

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[15]Contrast, Bamforth's first sense in which unconscionability is applied, above, note 2, at pages 539-540.

[16]M.P. Thompson, "From Representation to Expectation: Estoppel as a Cause of Action" [1983] CLJ 257. Thompson reasserted his support for a broad approach in his commentary on *Taylor v Dickens:* "Emasculating Estoppel" [1998] Conv. 210. See also Margaret Halliwell, above, note 11. In contrast, see Martin Dixon, "Estoppel: A Panacea for all Wills?" [1999] Conv. 46. He considers, at pages 48-49 that the two recent decisions in *Gillett v Holt* [1998] 3 All ER 917 and *Taylor v Dickens*, above, note 13, "demonstrate that the principle of unconscionability as the foundation for estoppel, is not a broadly defined remedy."

[17]Above, note 13.

[18]Thompson (1998), above, note 16, at page 213.

[19]Above, note 13, at page 820.

(ii) Unconscionability in Place of Detriment

This approach, unlike the others discussed, has not been suggested in a claim to proprietary estoppel. It is derived from the judgment in *Boustead*. The court said:

> "We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel ... All that need be shown is that in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights. In the resolution of this issue, a judicial arbiter would, when making his assessment of where the justice of the case lies, be entitled to have regard to the conduct of the litigant raising the estoppel. This may, but need not in all cases, include the determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment".[20]

Taking the judgment of the court as a whole, the court considered estoppel to arise when three elements are satisfied. First, there must be an assurance or representation which may, as the court held, be derived by silence. Second, the claimant must "place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actions".[21] Thirdly, that it would be unjust (or unconscionable) for the representor to insist on his strict legal rights. The first and second requirements broadly mirror the English courts' interpretation in proprietary estoppel cases of the need for an assurance and reliance. The significant difference lies in the apparent substitution of detriment by the Federal Court for a demonstration of "unjust". With respect, it is submitted this approach would not be accepted by English courts. In the absence of a detriment (or a change of position), it would not be unconscionable for the representor to assert his legal rights. To accept otherwise would enable the enforcement of a unilateral, bare promise. This would establish a

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[20]Above, note 1, at page 348.

[21]Above, note 1, at page 347.

[22](1996) 72 P. & C.R. 196.

much broader exception to the general rule that equity will not perfect an imperfect gift than has previously been recognised.

(iii) Unconscionability as an Element to Consider in Determining the Appropriate Remedy

In *Sledmore v Dalby*,[22] the English Court of Appeal seemed to treat estoppel as arising without considering whether it was unconscionable for the representor to assert her legal rights. Instead, unconscionability was taken into account in the context of ascertaining the appropriate remedy. This approach runs contrary to the statement in *Crabb* (above) that an estoppel cannot be established unless it is unconscionable for legal rights to be asserted. Milne has argued that in *Sledmore*, the absence of unconscionability should have been used to prevent the estoppel arising.[23]

(iv) Unconscionability Must be Established in Addition to an Assurance and Detrimental Reliance

The final suggestion is that unconscionability must be established in addition to assurance and detrimental reliance.[24] If, as will be submitted, this is the correct approach, then it rasies the question of the relationship between unconscionability and those other requirements. What further evidence is needed to establish unconscionability? Wilken & Villiers suggest that once the assurance and detrimental reliance are established, "the court will take into account 'all the circumstances of the case' to ascertain whether it would be unconscionable to deny the claimant a remedy".[25] In *Gillett v Holt*,[26] Carnworth J. suggested that "normally it is the promisor's knowledge of the detriment being suffered in reliance

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[23]"Proprietary Estoppel and the Element of Unconscionable Conduct" [1997] CLJ 34, at page 36.

[24]Contrast Bamforth's third sense in which unconscionability is applied, above, note 2, at pages 540-541.

[25]Sean Wilken & Theresa Villiers, "Waiver, Variation and Estoppel" (1998), at page 244 (footnote omitted).

[26]Above, note 16.

on his promise which makes it 'unconscionable' for him to go back on it".[27] In *Crabb*, Scarman L.J. said that to determine whether it would be unconscionable for the representor to assert their rights required a consideration of Fry J.'s probanda.[28] By reference to this, Milne suggested that satisfaction of the probanda "not only establishes that there has been detrimental reliance on a belief encouraged by a person with inconsistent legal rights, it also proves that the assertion of the legal right involved would be unconscionable".[29] In contrast, he considers that when the *Taylors Fashions* approach is applied, unconscionability is expressly an issue.[30] However, the cases do not fit nearly within this distinction. For example, unconscionability was not discussed in *Re Basham*,[31] although the court's approach broadly corresponds with *Taylors Fashions* and, further, the judge, Edward Nugee Q.C., noted that the probanda were not satisfied.[32] The better view may be that, regardless of the approach adopted, unless unconscionability is expressly discussed it is implicit that the court considers it unconscionable for the representor to renege on the assurance. This is the basis upon which the judgment in *Re Basham* has been treated.[33]

It is submitted that this is the correct role of unconscionability in estoppel. Unconscionability acts as a supplement to the orthodox need to establish an assurance and detrimental reliance, but not as a substitute. Further, adopting this approach helps answer a question which may be seen as the flip-side to the issue that has been addressed in this part

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[27]Above, note 16, at page 929.

[28]Above, note 13, at page 195.

[29]"Proprietary Estoppel in a Procrustean Bed" (1995) 58 M.L.R. 412, at pages 412-413.

[30]*Ibid.*

[31][1986] 1 W.L.R. 1498.

[32]Above, note 31, at page 1508.

[33]This interpretation has been given in response to Judge Weeks' criticism of *Re Basham* in *Taylor v Dickens*, above note 13, at page 821 for omitting the requirement of unconscionability. See *Gillett v Holt*, above, note 16, at page 928 and Thompson (1998), above, note 16, at page 216.

of the paper. Accepting that unconscionability underlies estoppel, in what circumstances is estoppel the appropriate response to unconscionable conduct? This point will now be expanded upon by considering the relationship between proprietary estoppel and restitution.

Proprietary Estoppel and Restitution

Restitution and estoppel can both be responses to forms of unconscionable conduct.[34] Restitution is the response to unjust enrichment. There are cases in which a claim to estoppel also establishes that the representor has been unjustly enriched at C's expense. For example, where C acts on an assurance that if he builds a house on the representor's land, the land will be given to C.[35] The representor may be estopped from reneging on the assurance as, following C's detrimental reliance, it would be unconscionable for him to do so. However, if the representor reneges on the assurance, then he may also be considered to be unjustly enriched at C's expense. Whether C's claim is treated as being an estoppel or to lie in unjust enrichment will have an impact on the remedy awarded. If C's claim lies in unjust enrichment, then he will obtain restitution of the (financial) amount by which the representor would otherwise by unjustly enriched. If C's claim is to an estoppel, then the remedy lies in the court's discretion. The court may award C his full expectation: legal title to the land. Given this difference in outcome, when should C be restricted to restitution?

Birks suggests that the dividing line between estoppel and restitution lies between acquiescence and encouragement. His view is that restitution is the only appropriate response to acquiescence. He says,

[34]While restitution for subtractive unjust enrichment is typically founded on the plaintiff's vitiated consent, unjust enrichment for undue influence (though contrast Birks & N.Y. Chin, "On the Nature of Undue Influence" in J. Batson & D. Friedmann (Editors), "Good Faith and Fault in Contract Law") (1995), Ch. 3 and, more controversially, free acceptance and acquiescence, are concerned with the defendant's unconscionable behaviour.

[35]Contrast *Inwards v Baker*, above, note 13.

"There is a difference between inducing and not undeceiving".[36] However, it is established that acquiescence can generate an assurance of rights in a unilateral mistake case where the representor is aware C is acting in a mistaken belief as to his rights, and fails to inform C.[37] Hence, it is submitted that estoppel is the appropriate response to uconscionability when it arises in the context of an assurance and detrimental reliance. Where those factors are present, C may claim an estoppel regardless of whether he has been induced or merely has not been undeceived. Where estoppel is available, C may choose, notwithstanding, to seek only restitution.[38] However, where unconscionability arises (in the form of an unjust enrichment) in the absence of an assurance and detrimental reliance, no such choice is available and C's only cause of action is to seek restitution. The dividing line may be illustrated by a comparison of the effect of a representor's acquiescence in C's unilateral mistake and in C's misprediction.

Assume, first, that C builds a house on the representor's land in the mistaken belief that he has rights in the land. The representor is aware of his own rights, and of C's mistaken belief, but does not inform C. The representor's acquiescence may generate an assurance of rights upon which C has relied to his detriment and, therefore, C may assert an estoppel claim. Secondly, assume that C, although aware that he has no rights builds on the representor's land in the hope that rights will thereby by granted. In this example, C is a risk-taker who has mispredicted the effect of his actions. The representor is again aware of his own rights, and of C's misprediction. However, it is at least doubtful that the representor's acquiescence will generate an assurance of rights. There is no reported English case in which an assurance of rights for a proprietary estoppel has been derived from

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[36]"Introduction to the Law of Restitution", revised edition (1989), at page 291.

[37]*Ramsden v Dyson* (1886) L.R. 1 H.L. 129, at pages 140-141. In *Taylors Fashions*, above, note 8, at page 152, Oliver J. acknowledged that knowledge of the true position by the representor can be a determining factor. There, the acquiescence of one representor did not generate an assurance of rights as they were unaware of the true position.

[38]Contrast *Hussey v Palmer* [1972] 1 W.L.R. 1286.

acquiescence in a misprediction.[39] It may, notwithstanding, be considered unjust for the representor to benefit from C's misprediction. However, in the absence of an assurance of rights, the appropriate response is to reverse the unjust enrichment, not fulfil C's expectations.[40]

Conclusion

In the context of proprietary estoppel, the flexibility and broad utility of estoppel, referred to in *Boustead* is reflected in the differing factual contexts in which claims may arise and in the courts' remedial discretion. However, it is because of this flexibility that it is important to correctly delimit the scope of estoppel. By recognising the limitations to proprietary estoppel it is possible to reconcile the doctrine with the policy of formality that governs land transactions. The key limitation identified in this paper is the role attributed to unconscionability in estoppel claims. Although the need to prevent unconscionable conduct underlies proprietary estoppel, it is not the appropriate response to all cases of such conduct. Unconscionability gives rise to an estoppel claim only where it arises in the context of an assurance and detrimental reliance.

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[39]An estoppel claim succeeded in *Inwards v Baker*, above, note 13, where the representor actively encouraged C's misprediction (see Birks, above, note 36, at page 279). *Ramsden v Dyson*, above, note 37 has been interpreted by Birks, above, note 36, at pages 277-279 as involving a misprediction. The claim to estoppel in that case failed as the alleged representor was not aware of C's misprediction. This may imply that acquiescence in an assurance can generate an assurance, but the case was not discussed in those terms.

[40]Birks' argument that a landowner with knowledge of a misprediction is "unjustly" enriched is criticised by, example, Burrows, "The Law of Restitution" (1993), at pages 315-320.

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THE COMMUNICATIONS AND MULTIMEDIA ACT 1998: ROOM FOR ESTOPPEL?

Introduction

In 1998, Malaysia passed the Communications and Multimedia Act 1998. This Act regulates the communications and multimedia industry which consists of three traditionally distinct industries of telecommunications, broadcasting and Information Technology (IT). Preceding the CMA 1998, two pieces of legislation governed the telecommunications and broadcasting industries. The Telecommunications Act 1950 governed the telecommunications industry and the Broadcasting Act 1988 governed the broadcasting industry. The IT industry which is now under the ambit of the CMA 1998 used to be, or prefers to refer to themselves as being highly 'unregulated'.

As of 1 April 1999, the CMA 1998 repealed the Telecommunications Act 1950 and the Broadcasting Act 1988.[1] One of the policies of the CMA 1998 is to promote a civil society where information-based services provide the basis of continuing enhancements to the quality of work and life.[2] This may be achieved through the emphasis placed by the Government on self-regulation. By self-regulating the industry, the industry players will be able to determine with better efficiency the need of the consumers. The industry players will not be subjected to rigid, non-flexible rules and policies laid down by the government. Industry players will have better knowledge and

[1]Section 273.

[2]Section 3(2)(b).